

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





# 76-6030 & 76-6036

## United States Court of Appeals

For the Second Circuit.

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN  
NEW YORK, As Executors of the Last Will and Testament of  
ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY  
ASSOCIATION,

*Plaintiffs-Appellants,*

*against*

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK.

### JOINT BRIEF OF APPELLANTS. FILED

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# United States Court of Appeals

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NEW YORK as Executors of the Last Will and Testa-  
ment of Elizabeth M. Haas, Deceased, and WATERTOWN  
CEMETERY ASSOCIATION,

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## JOINT BRIEF OF APPELLANTS.

### Preliminary Statement.

The decision appealed from was rendered by Honorable Edmund Port, District Judge in the Northern District of New York. So far as appellants know at this writing, his supporting opinion has not been reported.

### The Issues.

When there are bequests to two nonprofit cemetery associations, is the estate entitled to an estate tax deduction in the amount of the bequests under Section 2055 (a) of the Internal Revenue Code, on one or both of the following grounds:

- (1) The cemetery associations are corporations organized and operated exclusively for charitable purposes;

(2) The cemetery associations are corporations organized and operated exclusively for religious purposes; or, in the alternative, that the bequests are to a trustee, and are to be used by such trustee for religious or charitable purposes, or both.

### **The Statute Involved.**

Internal Revenue Code of 1954 (26 U. S. C.):

"SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES."

(a) In general.—For purposes of the tax imposed by Section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers \* \* \*

(2) \* \* \* to or for the use of any corporation organized and operated exclusively for religious, charitable, \* \* \* purposes, \* \* \* no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(3) \* \* \* to a trustee, \* \* \* but only if such contributions or gifts are to be used by such trustee \* \* \* exclusively for religious, charitable, \* \* \* purposes, \* \* \* no substantial part of the activities of such trustee \* \* \* is carrying on propaganda, or otherwise attempting, to influence legislation, and such trustee \* \* \* does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office; or \* \* \*



It should be noted here that the parties have stipulated that, during the entire period from decedent's death in 1966 to the present time, no part of the net earnings of either cemetery association has inured to the benefit of any private stockholder or individual other than as an object of the purposes of the association; no substantial part of the activities of either association has been the carrying on propaganda, or otherwise attempting, to influence legislation; and that neither association has participated in, or intervened in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.<sup>1</sup>

It should also be noted here that we urged the District Court to hold that the bequest to Watertown Cemetery Corporation was in trust, or at least in the nature of a trust, since only the income could be used, and, accordingly, that the case comes within subdivision 3 of the above statute.<sup>2</sup> The Government took the position that it makes no difference which subdivision is used, since "the requisite purpose to which the bequest must be put is the same" under both subdivisions.<sup>3</sup> If this court feels that a choice must be made, we again urge a finding that the bequest is held in trust, and therefore subdivision 3 applies.

### Statement of the Case.

The action is for the recovery of additional estate tax assessed by Internal Revenue against the estate of Elizabeth M. Haas, deceased, on the ground that the bequests in the Haas will to Watertown Cemetery Association and

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<sup>1</sup>Appendix, pp. 57a and 124a-125a.

<sup>2</sup>Plaintiffs' Brief below, pp. 17-19.

<sup>3</sup>Defendant's Brief below, p. 4.

Grove Cemetery Association were not to be used for charitable or religious purposes, as claimed by the estate.

The court below, in deciding against the estate, cited as authority cases which limit the meaning of the term "charitable" to "relief of the poor," and held that nothing which these cemeteries have done qualified under that definition. The estate contends that the meaning of the term "charitable" has been broadened in recent years, both by the courts and by Internal Revenue Regulations, to encompass community benefit and lessening the burden of government; and further, that even if the old, more limited, definition still applies, these cemeteries nevertheless qualify as "charitable" organizations.

On April 3, 1967, the surviving plaintiff, The National Bank of Northern New York, and the now deceased plaintiff, Ruth K. Child, as executors of the estate of Elizabeth M. Haas, deceased, filed with the Internal Revenue Service an estate tax return in that estate and paid a tax thereon of \$106,644.33.<sup>1</sup>

On June 27, 1967, the Internal Revenue Service assessed against the estate an additional estate tax in the amount of \$920,367.36 which was paid by the executors under protest with \$14,713.27 interest on July 23, 1967.<sup>2</sup>

On April 2, 1969, the executors filed with Internal Revenue Service a Claim for Refund and on April 9, 1970, filed an Amended Claim for Refund of \$935,096.66 of the estate tax and interest so paid. During the month of June, 1970, the executors were advised that their Claim and

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<sup>1</sup>Appendix, p. 55a.

<sup>2</sup>Appendix, p. 55a.



Amended Claim had been disallowed to the extent of \$917,593.37 and they then filed with Internal Revenue Service a waiver of statutory notice of such disallowance.<sup>3</sup>

On or about August 21, 1970, the executors received from Internal Revenue Service a refund of \$19,010.88 and interest of \$3,487.58. This action to recover the difference, namely, \$916,085.78, between the Claims for Refund and the amount of the refund actually made, with interest and costs, was commenced on or about September 28, 1970, by service of a complaint to which an answer on behalf of the defendant, United States, was served on December 4, 1970.<sup>4</sup>

The action was submitted to the District Court on a stipulation of facts and exhibits, the testimony of one witness and the deposition of another witness.

The District Court dismissed the complaint of Watertown Cemetery Association for lack of jurisdiction, on the ground that only the taxpayer (the estate) is permitted to bring an action under 28 U. S. C. Sec. 1346 (a) (1), and dismissed the complaint of the estate on the merits. From this order<sup>5</sup> and judgment<sup>6</sup> both parties have appealed.<sup>7</sup>

### The Facts.

The plaintiff, The National Bank of Northern New York, is the surviving executor of the will of Elizabeth

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<sup>3</sup>*Id.*, p. 56a.

<sup>4</sup>*Id.*, p. 56a.

<sup>5</sup>Appendix, p. 19a.

<sup>6</sup>*Id.*, p. 6a.

<sup>7</sup>*Id.*, pp. 4a and 5a.

M. Haas, late of Watertown, New York, who died on January 15, 1966. Said will was admitted to probate by the Surrogate's Court of Jefferson County, New York, on November 30, 1966.<sup>1</sup>

The plaintiff, Ruth K. Child, during her lifetime and at the commencement of this action was a co-executor of said will and is now deceased.<sup>2</sup>

Said will contained the following provisions:<sup>3</sup>

EIGHTH: I give and bequeath to Grove Cemetery Association of LaFargeville, New York, the sum of Twenty-Five Thousand Dollars (\$25,000.00), the income only to be used for the care and maintenance of the Frederick Wetterhahn Family Burial plot in said Cemetery, including replacements, care of sod, cleaning and pointing-up the monument, and care and cleaning of the markers on said plot at least once every three years. Any surplus income may be used in the general care of the Cemetery.

TWENTY-FIRST: All the rest, residue and remainder of my property, real and personal of every name and nature, I give, devise and bequeath to The Rector, Churchwardens and Vestrymen of Trinity Church, Watertown, New York, and The Watertown Cemetery Association, to be divided equally between the two corporations, such amounts to be added to their respective Endowment Funds, and the income only to be used.

Of the legacy in the amount of \$25,000 to Grove Cemetery Association, the amount of surplus income which

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<sup>1</sup>Appendix, p. 54a.

<sup>2</sup>*Id.*, p. 54a.

<sup>3</sup>*Id.*, p. 55a.



may be used in the general care of the cemetery, over and above the amount required for care of the Wetterhahn plot, will be the income on the sum of \$23,000.<sup>4</sup>

Watertown Cemetery Association and Grove Cemetery Association were incorporated pursuant to Chapter 133 of the New York Laws of 1847 entitled "An Act Authorizing the Incorporation of Rural Cemetery Associations"; at the time of Miss Haas' death, both associations were governed by the New York Membership Corporations Law (now Not-For-Profit Corporation Law).<sup>5</sup>

Grove Cemetery Association was incorporated on August 14, 1869, for the sole purpose specifically stated in its certificate of incorporation "of procuring and holding lands to be used exclusively for a cemetery or place of burial of the dead." The sole activity of Grove Cemetery Association is the ownership, operation and maintenance as a cemetery of approximately five acres of land on the outskirts of LaFargeville, New York. On and after January 15, 1966, the amount which Grove Cemetery Association would have required to establish a fund to provide for perpetual care of the Frederick Wetterhahn Family plot in that cemetery, including replacements, care of sod, cleaning and pointing-up the monument, and care and cleaning of the markers on said plot at least once every three years, was the sum of \$2,000.<sup>6</sup>

Watertown Cemetery Association was incorporated on September 1, 1853, for the sole purpose specifically stated in the Act under which it was incorporated "of procuring and holding lands to be used exclusively for a ceme-

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<sup>4</sup>Appendix, p. 58a.

<sup>5</sup>*Id.*, pp. 56a-57a.

<sup>6</sup>Appendix, pp. 57a-58a.

tery, or place for the burial of the dead." The corporate name was changed to Brookside Cemetery Association, Inc., effective January 1, 1973. The sole activity of Watertown Cemetery Association is the ownership, operation and maintenance of a cemetery known as Brookside, approximately two miles from the City of Watertown, New York, comprised in all of approximately 162 acres of land. An aerial photograph of this cemetery and ground level photographs of various parts of the cemetery were admitted in evidence as Exhibit Q.<sup>7</sup>

The only revenues of both cemetery corporations are from the sale of burial plots, charges for the care and maintenance of burial plots, income from endowments and from funds set aside for maintenance purposes, gifts and bequests.<sup>8</sup>

The Village of Watertown was established in 1820 and four years later the Village was authorized by the Legislature to purchase and hold four acres of land for cemetery purposes.<sup>9</sup> The cemetery thus acquired was on what is now Arsenal Street in the City of Watertown.<sup>10</sup> From its inception, the Arsenal Street Cemetery was maintained at the expense of the Village and today, although no longer used for new burials, is maintained by the City of Watertown.<sup>11</sup>

In the early 1850's the Arsenal Street Cemetery was nearing its capacity and the Village Trustees, recognizing

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<sup>7</sup>Appendix, pp. 58a-59a.

<sup>8</sup>*Id.*, pp. 58a and 59a.

<sup>9</sup>*Id.*, p. 59a.

<sup>10</sup>*Id.*, p. 59a.

<sup>11</sup>*Id.*, p. 60a.

the need for additional burial plots either by enlarging the existing cemetery or by acquiring a new site, obtained an option to purchase land outside the Village limits for this purpose. The option provided that if the Village should decide not to exercise the option, the newly formed cemetery association would have the right to do so.<sup>12</sup>

Prior to the meeting of Village electors to decide whether or not the Village should purchase the new site, the Village trustees caused to be printed and distributed to each elector a letter, signed by the Village President, in which it was stated that "if the (Cemetery) Association should finally determine to go on, the (Village) Trustees will most cheerfully abandon the project, as they do not desire to add to the burdens of the Village unless it becomes necessary." Not surprisingly, the electors decided two to one to let the Association take over. Later the same day, the Association trustees voted to acquire the new site, and the purchase was completed on July 31, 1854.<sup>13</sup> The plaintiff, Watertown Cemetery Association, has owned and maintained that cemetery ever since.<sup>14</sup>

Down through the years, Watertown Cemetery Association has:

(a) conveyed to the Volunteer Firemen of Watertown a section of lots at reduced price; the area is embellished by a large monument and has always been maintained by the cemetery without charge;<sup>15</sup>

<sup>12</sup>Appendix, pp. 61a.

<sup>13</sup>*Id.*, p. 61a-62a.

<sup>14</sup>Book I of Exhibits: Records of Watertown Cemetery Corporation.

<sup>15</sup>Appendix, p. 63a.



(b) taken title to and rehabilitated an adjacent cemetery known as the Old Burrville Burying Ground, and has maintained it ever since;<sup>16</sup>

(c) raised over \$9,000 from private sources for construction of a public road from the city limits to the cemetery which, with some alteration through development of the state and county road systems, is still in existence;<sup>17</sup>

(d) dedicated without charge approximately 1,100 square feet of land within the cemetery to the Henry Keep Home, a nonprofit home for aged persons, for burial purposes;<sup>18</sup>

(e) dedicated without charge a plot of land for erection of a chapel;<sup>19</sup>

(f) permitted the use of that chapel building since 1963 by funeral directors and other cemeteries in the area for temporary winter storage of bodies, and has kept the access road to the chapel plowed and open at all times;<sup>20</sup> and

(g) maintained many occupied burial plots without charge.

In 1882, the cemetery established a perpetual care fund, payments to which are held in trust and the income is used to maintain the plot for which each payment is

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<sup>16</sup>*Id.*, p. 63a.

<sup>17</sup>*Id.*, pp. 63a-64a.

<sup>18</sup>*Id.*, p. 64a.

<sup>19</sup>*Id.*, p. 64a.

<sup>20</sup>*Id.*, p. 64a.



made. Plot owners making payments to the fund were relieved from further annual assessments. Amounts paid into the perpetual care fund for many of the plots do not now produce sufficient income to pay the present-day cost of care of those plots. Furthermore, there are 497 plots for which no perpetual care payments were ever made and, of these, the owners of only 30 plots are presently paying annual assessments. Nevertheless, all cemetery plots for which no perpetual care payment was ever made and for which annual assessments are not paid receive the same care and maintenance as the remaining plots in the cemetery for which provision has been made.<sup>21</sup>

### **The Law of New York.**

The Federal Courts take judicial notice of the state case law and statutes in reaching their decisions.<sup>1</sup>

In 1949, the State of New York materially revised Article IX of the Membership Corporation Law dealing with cemeteries (now Article 14 of the Not-For-Profit Corporation Law) by Chapter 533 of the Laws of 1949. The purpose of the revision is stated in Section 1 of that law as follows:

The people of this state have a vital interest in the establishment, maintenance and preservation of burial grounds and the proper operation of the corporations which own and manage the same. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic practices have been and are now being carried on in the maintenance and operation of cemeteries. To protect the well-being of our citizens, to promote the public welfare and to prevent cemeteries from falling into

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<sup>21</sup>Appendix, pp. 65a-66a.

<sup>1</sup>*Kaplan v. United States*, 436 F. 2d 799 (2nd Cir. 1971); *Old Colony Trust Co. v. U. S.*, 313 F. Supp. 980 (D.C. Mass. 1970).

disrepair and dilapidation and becoming a burden upon the community, and in furtherance of the public policy of this state that cemeteries shall be conducted on a non-profit basis for the mutual benefit of plot owners therein, the following provisions are enacted in the exercise of the police power of the state.<sup>2</sup>

The provisions which follow in the law are indeed well calculated to prevent continuance of the improper practices which the Legislature mentions.

A cemetery board was created, consisting of the secretary of state, the attorney general and the commissioner of health.<sup>3</sup> The board is directed to administer the provisions of the article;<sup>4</sup> shall receive annually from each cemetery corporation under its jurisdiction reports and accountings for the previous year of all moneys or other property received in trust for its use,<sup>5</sup> of the disposition of proceeds from the sale of lots,<sup>6</sup> of the perpetual care fund,<sup>7</sup> of all changes in the outstanding certificates of indebtedness of

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<sup>2</sup>New York Laws of 1949, chapter 533; set forth also in note following Section 71, McKinney 1970 Supp. to New York Membership Corporation Law.

<sup>3</sup>New York Membership Corporation Law, Section 71a-2 (McKinney Supp. 1970); New York Not-For-Profit Corporation Law, Section 1401(e)(1) (McKinney 1970).

Note: In the following footnotes, the applicable section of the Membership Corporation Law will be given first, followed by the corresponding section of the Not-For-Profit Corporation Law.

<sup>4</sup>Section 71a-9: Section 1401(e)(8).

<sup>5</sup>Section 76-6: Section 1401(k)(6).

<sup>6</sup>Section 87-5: Section 1401(z)(5).

<sup>7</sup>Section 92a-2: Section 1401(f)(f)(2).



the corporation,<sup>8</sup> and in relation to any matter about which the board requests information;<sup>9</sup> and is given the power to adopt such rules and regulations as it shall deem necessary for the proper administration of the article, to enforce its orders by mandamus or injunction, and to recover penalties imposed by the article.<sup>10</sup> It also is provided that notice shall be given to the board of various actions to be taken by a cemetery, some of which require the prior approval of the board, such as the adoption of rules and regulations and charges for any services rendered,<sup>11</sup> the laying out of roads through the cemetery,<sup>12</sup> the issuance of certificates of indebtedness,<sup>13</sup> the acceptance of conveyances of land within the confines of cemetery,<sup>14</sup> and the sale of any of its land devoted to cemetery use.<sup>15</sup>

The law specifically forbids a cemetery to "refuse or deny the right of burial and the privileges incidental thereto in any lot, plot or part thereof to those otherwise lawfully entitled to be buried therein, for any reason except for the nonpayment of interment charges and the purchase price of the lot, plot or part thereof, in accordance with the terms of the contract of purchase or except as provided in section ninety of this article."<sup>16</sup> Section 90 authorizes the cemetery to levy a modest tax against each lot if its funds

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<sup>8</sup>Section 97-2: Section 1401(m)(m)(2).

<sup>9</sup>Section 107-3: Section 1401(y)(y)(3).

<sup>10</sup>Section 108: Section 1401(z)(z).

<sup>11</sup>Section 82-2: Section 1401(s)(2).

<sup>12</sup>Section 95: Section 1401(k)(k).

<sup>13</sup>Section 97-1: Section 1401(m)(m)(1).

<sup>14</sup>Section 79b: Section 1401(p).

<sup>15</sup>Section 81-3: Section 1401(r)(4).

<sup>16</sup>Section 88: Section 1401(a)(a).

are insufficient properly to care for the cemetery and if such tax remains unpaid for five years, the unused portion of the lot may not be used for burial purposes while the tax remains unpaid.<sup>17</sup>

Probably the most important provision in the law governing cemeteries bearing upon the issues here is the section which restricts the use of all moneys received by a cemetery, absolutely or in trust, to certain enumerated purposes, and requires the investment of such funds in such securities as are lawful for investment by trustees under New York law. The legacies of each of the cemeteries involved in this action are of course subject to the provisions of this section, which is here set out:<sup>18</sup>

Section 76. Acquisition of property for special purposes and in trust.

A cemetery corporation may acquire, otherwise than by condemnation, real or personal property, absolutely or in trust, in perpetuity or otherwise, and shall use the same or the income therefrom in pursuance of the terms of the instrument by which it was acquired, for the following purposes *only*:

1. The improvement or embellishment, but not the enlargement, of its cemetery;
2. The construction, preservation or replacement of any building, structure, fence, wall, or walk therein;
3. The erection, renewal or preservation of any tomb, monument, stone, fence, wall, railing or other

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<sup>17</sup>Section 90-4: Section 1401(c)(c)(4).

<sup>18</sup>Section 76: Section 1401(k).



erection or structure on or around its cemetery or any lot or plot therein;

4. The planting or cultivation of trees, grass, shrubs, flowers or plants in or about its cemetery or any lot or plot therein;

5. The construction, operation, maintenance, repair and replacement of a crematory or columbarium or both in its cemetery;

6. The care, keeping in order and embellishment of any lot, plot or part thereof or the structures thereon, in its cemetery, as prescribed in the instrument transferring such property to the cemetery corporation, or by the person or persons from time to time having possession, care and control of such lot, plot or part thereof, as the case may be.

All moneys and property received by a cemetery corporation in trust under this section, unless otherwise provided in the instrument under which such moneys or property were received and unless already so invested when received, shall be invested within a reasonable time after the receipt thereof, and kept invested, in such securities as are permitted for the investment of trust funds by section twenty-one of the personal property law, \* \* \* (Emphasis supplied.)

Another New York statute specifically declares that dispositions of property in trust to cemeteries are charitable in nature:<sup>18a</sup>

Dispositions of property in trust for the purpose of the perpetual care, maintenance, improvement or embellishment of cemeteries or private burial lots in cemeteries, and the roadways, lawns, hedges,

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<sup>18a</sup>New York Estates, Powers and Trust Law, Section 8-1.5 (McKinney 1968).

walks, fences, monuments, structures and tombs in such cemeteries or on such private burial lots are permitted and *shall be deemed to be for charitable and benevolent purposes.* (Emphasis supplied.)

It is significant that the purposes for which a trust fund may be used, listed in the last above quoted statute, are synonymous with those permitted by Section 76 of the Membership Corporation Law. It is therefore implied by statute that the uses to which New York cemeteries may put their trust income are limited exclusively to those which are for "charitable and benevolent purposes."

New York imposes a statutory duty of decent burial of the dead upon its citizens.<sup>19</sup> Incident to this duty is the requirement of providing and maintaining a proper place to receive the dead,<sup>20</sup> which must be kept in proper condition and appearance.<sup>21</sup> A cemetery has a definite life span. So long as it is able to sell lots, it receives income and can furnish the care and attention demanded by the community and by the relatives and friends of those buried there. But eventually it will use up its available space. The relatives and friends of the decedents will die or

<sup>19</sup>New York Public Health Law, Section 4200 (McKinney 1971).

<sup>20</sup>New York Membership Corporation Law, Sections 86a-1 and 87-1 (McKinney Supp. 1970); New York Religious Corporation Law, Section 7 (McKinney 1952); *French v. Kenisco Cemetery*, 264 App. Div. 617, 35 N. Y. S. 2d 826, 829 (2nd Dept. 1942).

<sup>21</sup>*Conn v. Boylan*, 224 N. Y. S. 2d 823, 835 (Sup. Ct., Suffolk Co. 1962); *People ex rel. Woodlawn Cemetery v. Chambers*, 91 N. Y. S. 2d 774, 777 (Sup. Ct., Bronx Co. 1949); New York Membership Corporation Law, Sections 76 and 87 (McKinney Supp. 1970); New York Religious Corporation Law, Section 7 (McKinney 1952); New York County Law, Section 222-5-a (McKinney 1972); New York Town Law, Section 291-1 (McKinney Supp. 1975).



move away. The source of funds will dry up, and its care and maintenance will become entirely dependent upon its perpetual care fund. If this is not adequate the cemetery will become run down, overgrown with weeds, and an eyesore, thereby detracting from the aesthetic values which most communities foster. At this point, the cemetery may very well become a burden on the community. It is interesting to note that counties<sup>22</sup> and towns<sup>23</sup> are specifically authorized to provide for the maintenance of abandoned and unendowed cemeteries from public funds.

### Charitable Purpose.

Federal law determines whether the purposes for which the income from a trust can be used entitle an estate to an estate tax deduction.<sup>1</sup> It seems to be well settled that a statute granting a deduction for charitable purposes is not to be strictly construed.

\* \* \* in view of the fact that bequests for public purposes operate in aid of good government and perform by private means what ultimately would fall upon the public, exemption from taxation is not so much a matter of grace or favor as rather an act of public justice. The reason for the rule of narrow scrutiny of a statute does not apply to such cases.<sup>2</sup>

<sup>22</sup>New York County Law, Section 222-5-a (McKinney 1972).

<sup>23</sup>New York Town Law, Section 291-1 (McKinney Supp. 1975).

<sup>1</sup>*Morgan v. Commissioner*, 309 U. S. 78, 60 S. Ct. 424 (1940).

<sup>2</sup>*Harrison v. Barker Annuity Fund*, 90 F. 2d 286, 288 (7th Cir. 1937).

Federal courts have taken an increasingly liberal attitude as to what constitutes charity. The basic rationale for this is that,

The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed.<sup>3</sup>

The foregoing case involved a charitable deduction for income tax purposes. A similar statutory interpretation has been applied to a charitable deduction for estate tax purposes.<sup>4</sup>

The most significant case to expand the definition of the word "charitable" was *Dulles v. Johnson*,<sup>5</sup> in which this court held that bequests to the New York city, county and state bar associations are entitled to an estate tax deduction under I.R.C. Section 812(d), forerunner of Section 2055. This court felt that the activities of these bar associations benefit the public generally and are therefore a public service, even though some benefit is incidentally derived by their members, and accordingly the estate was entitled to a charitable deduction in the amount of each bequest. For example, in discussing the matter of regulation of the unauthorized practice of law, this court said:

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<sup>3</sup>*Helvering v. Bliss*, 293 U. S. 144, 151, 55 S. Ct. 17, 20 (1934).

<sup>4</sup>*Beggs v. United States*, 27 F. Supp. 599, 606 (Ct. Claims 1939).

<sup>5</sup>*Dulles v. Johnson*, 273 F. 2d 362 (2nd Cir. 1959), cert. den. 364 U. S. 834, 81 S. Ct. 54 (1960).



If these activities were not undertaken by the Associations, the cost of this necessary regulation would descend upon the public.<sup>6</sup>

In discussing the matter of disciplining the legal profession, this court said:

While increased public esteem for lawyers may result in material advantage to members of the legal profession, the true benefit from a disciplined and socially responsive bar accrues directly to the public.<sup>7</sup>

And in discussing the matters of improving court procedure and endorsement of judicial candidates, this court said:

These activities clearly constitute a public service, \* \* \*

This rationale has been followed in other cases.<sup>8</sup>

The principle laid down in *Dulles v. Johnson* is the crux of our argument. We contend that the sole purpose for which these cemeteries can use the income from the Haas bequest is the furnishing of a place to bury the dead, and the care and maintenance of that place; that, if this activity were not undertaken by these cemeteries and like associations, the cost thereof would devolve upon the public, since it is unthinkable that there would be no place to bury the dead; that the conclusion is therefore inescapable

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<sup>6</sup>*Id.*, p. 366.

<sup>7</sup>*Id.*, p. 366.

<sup>8</sup>*Id.*, p. 367.

<sup>9</sup>*St. Louis Union Trust Company v. United States*, 374 F. 2d 427 (8th Cir. 1967); *Rhode Island Hospital Trust Co. v. United States*, 159 F. Supp. 204 (D.C. Rhode Island 1958).

that this purpose is charitable within the meaning of Section 2055 (a); and that therefore this estate is entitled to a charitable deduction in the amount of the Haas bequests to the two cemeteries.

Another indication of the way in which courts have expanded the meaning of the term "charitable" over and beyond the old meaning of "relief of the poor" is the case of *Eastern Kentucky Welfare Rights Organization v. Simon*,<sup>10</sup> wherein the court was asked to declare invalid and set aside Revenue Ruling 69-545, which allows non-profit hospitals to qualify as "charitable" institutions under Sec. 501(c)(3) of the Internal Revenue Code (relating to income taxation) without requiring them to admit and provide free or reduced rate services to persons unable to pay.

The action was commenced by various health and welfare organizations and several private citizens, all alleging indigency and inability to pay for hospital services and presenting affidavits recounting incidents in various parts of the country involving the denial of hospital services to indigents by institutions enjoying tax-exempt status as "charitable" organizations.

The District Court granted summary judgment to plaintiffs<sup>11</sup> and the Government appealed. The Circuit Court of Appeals for the District of Columbia reversed the District Court,<sup>12</sup> holding that the Revenue Ruling under attack was founded on a permissible definition of the term "charitable," was not contrary to any express congressional intent, and should not be set aside. Certiorari was granted

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<sup>10</sup>506 F. 2d 1278 (D. of C. Cir. 1974).

<sup>11</sup>370 F. Supp. 325 (D.C. 1973).

<sup>12</sup>506 F. 2d 578 (D. of C. Cir. 1974).



by the Supreme Court;<sup>13</sup> the case was argued before the Supreme Court on December 9, 1975, and at this writing the Supreme Court has not handed down its decision. The following is a summary of the reasons given by the Court of Appeals for its decision.

Hospitals (the Court of Appeals said) have never been expressly categorized as tax-exempt organizations and have achieved that status only by qualifying as "charitable" organizations. Long-established policy, as set forth in Revenue Ruling 56-185, held that hospitals qualified as charitable organizations only if they provided free or below cost service to those unable to pay. This ruling was modified by Revenue Ruling 69-545, which broadly defines "charitable" in terms of community benefit and holds that the promotion of health constitutes a charitable purpose. Thus, the provision of free or below cost service to those unable to pay is no longer essential.

The definition of the term "charitable" has never been static and has been broadened in recent years. Prior to 1959, Treasury Regulations generally defined charitable organizations as those operated for relief of the poor. In 1959, however, a comprehensive set of regulations interpreting Sec. 501(c)(3) was issued. These regulations adopted a broad concept of "charitable." The key provision, Section 1.501(c)(3)-1(d)(2) reads:

"(2) *Charitable defined.* The term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the

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<sup>13</sup>95 S. Ct. 1974 (May 19, 1975).

underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; *lessening of the burdens of Government*; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human rights secured by law; or (iv) to combat community deterioration and juvenile delinquency."<sup>14</sup>

The term "charitable" (the Circuit Court goes on to say) is thus capable of a definition far broader than merely relief of the poor. While the term may have been so limited in the past, there is no authority for the conclusion that the determination of "charitable" status was always to be so limited. Such an inflexible construction fails to recognize the changing economic, social and technological precepts and values of contemporary society.<sup>15</sup>

Finally, the Circuit Court points out that the rapid growth of medical and hospital insurance, Medicaid and Medicare has greatly reduced the number of poor people requiring free or below cost hospital services.

Thus, it appears that the rationale upon which the limited definition of "charitable" was predicated has largely disappeared. To continue to base the "charitable" status of a hospital strictly on the relief it provides for the poor fails to account for these major changes in the area of health care.<sup>16</sup>

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<sup>14</sup>*Eastern Kentucky Welfare Rights v. Simon*, 506 F. 2d 1278, 1286 (D. of C. Cir. 1974).

Note: The emphasized words "lessening of the burden of government" are not germane to the *Eastern Kentucky* case, but are germane to this case.

<sup>15</sup>*Id.*, p. 1288.

<sup>16</sup>*Id.*, p. 1288.



While it is true that the *Eastern Kentucky* case deals with exemption from income taxation, it should still be considered an authority in construing the meaning of the term "charitable" in the section dealing with deductions for estate tax purposes. Would it not create an incongruous situation if the courts should hold that, for purposes of income taxation, the broad definition should apply, but that, for the purposes of estate taxation, the narrow definition should apply? We submit that there should be a compelling reason for creating such an anomalous situation.

Finally, we contend that these cemeteries meet the requirement of the old, more restricted, definition of "charitable." The evidence shows that Watertown Cemetery Association has in the past conveyed at reduced or no cost sections of its cemetery to nonprofit organizations for burial purposes, and continues to maintain them without charge; has taken over, rehabilitated and continues to maintain an adjacent cemetery; has constructed and maintained a road from the City of Watertown to the cemetery (now maintained by the public); has permitted the use of its building, originally constructed as a chapel in the cemetery, by funeral directors and other cemeteries in the area, at a nominal charge, for temporary winter storage of bodies; and, most important of all, has continued to maintain a large number of burial plots without compensation, in the same manner that those plots for which provision has been made for perpetual care are cared for, where no provision for perpetual care was ever made, and whose owners fail to pay annual assessment for such care.<sup>17</sup>

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<sup>17</sup>Appendix, pp. 63a-66a.

The court below dismissed this last contention, saying: "The Cemetery Associations do not pay for this care themselves, however, it is made possible by the contribution of others."<sup>18</sup> There is nothing in the evidence to this effect; in fact, the statement is contrary to fact. The court below cites in support of its conclusion a statement made by the attorney for the estate at the trial, that "the same care is given to all grave sites, to every part of the cemetery, regardless of financial contribution, and in a sense then it is the generosity and payment of others who are taking care of those who did not in a financial manner contribute."<sup>19</sup> The attorney for the estate did not intend to state or imply that any third persons, strangers to the cemetery associations, contribute the cost of maintaining these graves; he intended to say, what is fact, that the cemetery associations pay the cost of such care from their own funds, which are of course received from various sources such as the perpetual care fund, sale of lots, bequests, etc. These are the "others" to which he referred.

### **Reply to Opinion Below.**

The court below points out that Section 501(c)(3) exempts charitable corporations from payment of income tax, and then specifically exempts cemetery corporations in subdivision (c)(13); that Section 170(c)(2) allows an income tax deduction for contributions to a charitable corporation, and then specifically allows a deduction for contributions to cemetery corporations in subdivision (c)(5); but that Section 2055(a), which grants a deduction for estate tax purposes for bequests to charitable corporations, has no corresponding section specifically author-

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<sup>18</sup>*Id.*, p. 17a.

<sup>19</sup>Appendix, p. 93a.



izing a deduction for a bequest to a cemetery corporation. The court below concluded:

Where Congress has wished to provide for special tax treatment of cemetery corporations, it has done so specifically; the absence of a provision dealing with cemetery associations in the estate tax area is highly significant.<sup>1</sup>

The court below did not go so far as to say that *no* cemetery corporation can qualify as charitable; indeed, the *Gund* case, on which the court below strongly relied, specifically says that:

A cemetery association doubtless could be so organized and operated as to be a charitable organization within the meaning of the act, but it appears that no free burial space is ever provided by the Oak Grove Cemetery Association, or that less than fair value is ever charged for burial rights or upkeep.<sup>2</sup>

Thus, it is conceded that there is one way, at least, that a cemetery corporation can qualify as charitable, by furnishing plots or services for less than fair value. But we contend that *Dulles*<sup>3</sup> and *Eastern Kentucky*<sup>4</sup> point to a second way, namely, by providing a public service and lessening the burden of government.

<sup>1</sup>Appendix, p. 14a.

<sup>2</sup>*Gund's Estate v. Commissioner*, 113 F. 2d 61, 62 (6th Cir. 1940), cert. den. 311 U. S. 696, 61 S. Ct. 134.

<sup>3</sup>*Dulles v. Johnson*, 273 F. 2d 362 (2nd Cir. 1959), cert. den. 364 U. S. 834, 81 S. Ct. 54 (1960).

<sup>4</sup>*Eastern Kentucky Welfare Rights Org. v. Simon*, 506 F. 2d 1278 (D. of C. Cir. 1974).

We suggest that, when Congress specifically mentioned cemeteries in Sections 501(3)(13) and 170(c)(5), it intended to extend tax benefits to those cemeteries that could not otherwise qualify as charitable. Thus, the John D. Rockefeller Family Cemetery Corporation, a private cemetery corporation, was held to be exempt from income taxation. The Government argued that Section 501(c)(13) is impliedly restricted to "public" cemetery corporations, but the Tax Court rejected this argument and held for the taxpayer.

We think it significant that Congress enacted a special exemption provision for cemetery organizations as well as for other types of organizations which would be unable to meet the stricter 501(c)(3) tests which require service to public interests rather than to private ones.<sup>5</sup>

To the same effect is DuPont de Nemours Cemetery Company.<sup>6</sup>

### **Religious Purpose.**

The plaintiffs' contention that the cemeteries involved here are performing a religious function and therefore serving a religious purpose, rests completely upon the testimony of their witness, Dr. Milton McC. Gatch, who so testified.<sup>7</sup> We cannot in this brief improve upon the reasoning which led him to this conclusion, nor will we attempt to do so; rather, we urge the court carefully to

<sup>5</sup>John D. Rockefeller Family Cemetery Corp., 63 T.C. No. 31, Docket No. 1126-72; appeal to 2nd Cir. withdrawn 4/16/75.

<sup>6</sup>DuPont de Nemours Cemetery Company, T.C. Memo 1974-314, Docket No. 7081-73.

<sup>7</sup>Plaintiffs' Exhibit 1, Appendix, pp. 139a-140a and Plaintiffs' Exhibit 1A, Appendix, pp. 149a-163a.



review his qualifications, his testimony, and the signed statement<sup>2</sup> which was admitted in evidence as a part of his direct examination.

The court below found that "the Cemetery Associations here are not 'religious' in fact or within the meaning of Section 2055(a)."<sup>3</sup> One of the grounds for this finding the court expressed as follows:

The same reasoning, applied earlier, which precludes a cemetery association from being a charitable entity within the meaning of Section 2055(a) likewise precludes a cemetery association from being religious for estate tax purposes. Congress has continuously treated religious institutions and cemeteries as separate and distinct entities and it has chosen not to include contributions to the latter as estate tax deductions.<sup>4</sup>

The court below seems to be saying that a cemetery cannot under any circumstances be "operated for religious purposes." We have previously demonstrated in this brief that a cemetery may be operated for charitable purposes, in spite of the fact that cemeteries are separately enumerated in Section 170 (gift tax) and Section 501 (income tax), but not in Section 2055 (estate tax). By the same reasoning, a cemetery is *not precluded* from asserting that it performs a religious function.

The court below also stated as one of the reasons for his finding, that "an atheist would absolutely be allowed burial in the Cemeteries involved."<sup>5</sup> They certainly

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<sup>2</sup>Plaintiffs' Exhibit 1A, Appendix, pp. 149a-163a.

<sup>3</sup>Appendix, p. 17a.

<sup>4</sup>*Id.*, p. 17a.

<sup>5</sup>Appendix, p. 18a.

would. Not only does the New York statute<sup>6</sup> require them to do so, but it would be a most un-Christianlike act to refuse anyone, atheist or not, a decent burial. Would any denominational church be denied its religious standing under the law if it should welcome an atheist to participate in its religious services?

### Real Party in Interest.

The court below dismissed the complaint of Watertown Cemetery Association for lack of jurisdiction, on the ground that only the taxpayer, here the estate, is permitted to bring an action under 28 U. S. C. Section 1346(a) (1).<sup>1</sup> Of the cases cited by the court below in support of that conclusion, the first, and the one cited by the others in support of their decisions, is First National Bank of Emlenton, Pennsylvania.<sup>2</sup> However, the cause of action asserted by the non-taxpayer in that case was different from the cause of action which could have been asserted by the taxpayer. The plaintiff there was attempting to recover money realized by the United States on a distraint sale of the taxpayer's interest in personal property upon which the plaintiff had a chattel mortgage. The decision there was obviously correct, since the language of Section 1346(a)(1), which grants to the District Court jurisdiction to entertain "any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected \* \* \*,"

is reasonably to be read as merely authorizing a taxpayer, or *perhaps someone claiming the in-*

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<sup>6</sup>New York Membership Corporation Law, Section 88; New York Not-For-Profit Corporation Law, Section 1401(a)(a).

<sup>1</sup>Appendix, pp. 18a-19a.

<sup>2</sup>265 F. 2d 297 (3rd Cir. 1959).



*terest of a taxpayer, to sue to get back taxes which the taxpayer has wrongfully been required to pay*  
 \* \* \* Appellant does not and cannot claim that he is an aggrieved taxpayer *or that he is asserting a claim in the interest of any such person.* Thus, this is not the type of claim with which Section 1346(a)(1) is concerned.<sup>3</sup> (Emphasis supplied.)

It is clear that the Government had not consented to be sued by that plaintiff on that cause of action. But had the plaintiff been one "claiming the interest of a taxpayer," the opinion implies that the result would have been different.

Watertown Cemetery Association claims the interest of a taxpayer in the recovery of the estate tax herein alleged to have been erroneously and illegally assessed and collected. It alleged in its complaint<sup>4</sup> and in its claim for refund,<sup>5</sup> which was incorporated in the complaint,<sup>6</sup> that it is a real party in interest in the action because the amount of additional tax, the recovery of which is sought in the action, was charged against the cemetery's legacy, thereby causing its share of the estate, and the income thereon, which would otherwise be paid to the cemetery, to be reduced by that amount, and offered in evidence at the trial as proof of such allegations, Exhibit 2,<sup>7</sup> a letter agreement by Trinity Church, which with Watertown Cemetery Association will share the residuary,<sup>8</sup> that "any

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<sup>3</sup>*First National Bank of Emlenton, Pennsylvania*, 265 F. 2d 297, 299-300 (3rd Cir. 1959).

<sup>4</sup>Appendix, p. 25a.

<sup>5</sup>*Id.*, pp. 37a-38a.

<sup>6</sup>*Id.*, p. 27a.

<sup>7</sup>*Id.*, pp. 119a-120a.

<sup>8</sup>Par. 21 of Will, Appendix, p. 55a.

moneys recovered from the United States of America and the State of New York on the claims by the estate for refund of estate taxes, which are attributable to a finding that Watertown Cemetery Association is exempt from estate tax, should belong, both principal and interest, to Watertown Cemetery Association, since the additional tax was charged to the principal account of Watertown Cemetery Association by the executors of the estate."<sup>9</sup> We assign as reversible error the refusal of the trial court to receive Exhibit 2 in evidence.

The "real party in interest" rule<sup>10</sup> states that

Every action shall be prosecuted in the name of the real party in interest. An executor \* \* \* *may* sue in his own name without joining with him the party for whose benefit the action is brought \* \* \* (Emphasis supplied.)

The use of the word "may" instead of the word "shall" is significant, and implies that the executor may, if he wishes, join with him one whose financial interest will be directly affected by the result.

It seems to this plaintiff cemetery that not to allow it representation in an action which, if successful, will put something over \$900,000 in its treasury, is unfair. Since neither Section 1346(a)(1) nor Rule 17 preclude Watertown Cemetery Association from participating as a party, it was improper for the Trial Court to do so.

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<sup>9</sup>Exhibit 2, not received in evidence.

<sup>10</sup>28 U.S.C. Rule 17, Federal Rules of Civil Procedure.



**Conclusion.**

We respectfully request this court to reverse the order and judgment of the court below; to reinstate Watertown Cemetery Association as a party plaintiff in the action; to determine that the bequests in issue are deductible from the gross estate of Elizabeth M. Haas under 26 U.S.C. 2055(a)(2) or (3); to grant judgment in favor of the plaintiffs, Ruth K. Child and The National Bank of Northern New York, as Executors of the Last Will and Testament of Elizabeth M. Haas, Deceased, and against the defendant in the amount of \$916,085.78, or whatever greater amount may be legally refundable to said estate, together with such interest and costs as are allowed by law; and to grant to either plaintiff, or to both, such other relief as this court may deem just and proper.

Respectfully submitted,

HENRY H. WILLMOTT,  
Attorney for Plaintiff-Appellant,  
The National Bank of Northern New  
York, as Executor of the Last Will  
and Testament of Elizabeth M. Haas,  
Deceased.

CONBOY, MCKAY, BACHMAN & KENDALL,  
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